(2)

Supreme Court, U.S.
FILED
MAR 9 1998
CLERK

No. 97-1291

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RICHARD A. SCHMIDT,
Petitioner,
v.
SHEET METAL WORKERS' NATIONAL PENSION FUND,
and
SHEET METAL WORKERS' NATIONAL PENSION FUND
BOARD OF TRUSTEES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

NAOMI E. SOLDON
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER &
BRUEGGEMAN, S.C.
1555 N. RiverCenter Drive
Suite 202
P.O. Box 12993
Milwaukee, WI 53212
(414) 271-4500
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp

QUESTION PRESENTED FOR REVIEW

A non-fiduciary employee of the Sheet Metal Workers' National Pension Fund, in response to a participant's telephone request for information, allegedly sent the participant the wrong form. Perhaps as a result of this error, the participant did not properly designate his son as the primary beneficiary of his death benefit under the plan, and, therefore, under the terms of the plan the son and daughter each received 50% of the benefit upon the participant's death. The Fund's Board of Trustees, each member a fiduciary of the Fund, did not contribute to the employee's error; indeed, the Board of Trustees prudently hired, trained and maintained the non-fiduciary employee.

The question presented is as follows:

> Whether the non-fiduciary's alleged oral misrepresentation of a written plan provision creates a cause of action under ERISA against the Board of Trustees for a breach of fiduciary duty.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	3
Facts	3
REASONS FOR DENYING THE WRIT	4
A. THE SEVENTH AND D.C. CIRCUITS ARE NOT IN CONFLICT BECAUSE THE *SCHMIDT* AND *EDDY* CASES ARE MATERIALLY DIFFERENT IN THEIR FACTS, ISSUES AND HOLDINGS	4
B. PETITIONER'S ARGUMENT THAT PLAN FIDUCIARIES ARE BOUND BY A NON-FIDUCIARY EMPLOYEE'S ORAL MISREPRESENTATION IS CONTRARY TO ERISA, AND IF ACCEPTED, WOULD JEOPARDIZE THE SOLVENCY OF PENSION PLANS LIKE THE FUND	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Carlo v. Reed Rolled Thread Die Company, 49 F.3d 790 (1st Cir. 1995) 8

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. ——, 131 L.Ed.2d 94 (1995) 9

Eddy v. Colonial Life Insurance Company of America, 919 F.2d 747 (D.C. Cir. 1990) 5, 6, 7

Franklin v. QHG of Gadsen, Inc., 127 F.3d 1024 (11th Cir. 1997) 9

Librizzi v. Children's Memorial Medical Center, Case No. 97-1934, 1998 U.S. App. LEXIS 1039 (7th Cir. 1/26/98) 8

Moore v. Metropolitan Life Insurance Company, 856 F.2d 488 (2nd Cir. 1998) 8

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1996) 8, 9

Plumb v. Fluid Pump Service, Inc., 124 F.3d 849 (7th Cir. 1997) 8

Pohl v. National Benefit Consultants, 956 F.2d 126 (7th Cir. 1992) 8

Sprague v. General Motors Corporation, Nos. 94-1896/94-1897/94-1898/94-1937, 1998 U.S. App. LEXIS 84, *37 (6th Cir. 1998) 8

United Paperworkers v. Jefferson Smurfit, 961 F.2d 1384 (8th Cir. 1992) 8

Weir v. Federal Asset Disposition Ass'n, 123 F.3d 281 (5th Cir. 1997) 8

White v. Provident Life & Accident Insurance Company, 114 F.3d 26 (4th Cir. 1997) 8

Statutes:

§ 402, 29 U.S.C. § 1102(a)(1) 1

§ 402, 29 U.S.C. § 1106(b)(1) 7

Other Authority:

29 C.F.R. § 2509.75-8, Item D-2 ..... 2, 10

29 C.F.R. § 2520.104b-1(b)(1) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1291

RICHARD A. SCHMIDT,

Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND,

and

SHEET METAL WORKERS' NATIONAL PENSION FUND BOARD OF TRUSTEES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 402, 29 U.S.C. § 1102(a)(1):

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 C.F.R. § 2509.75-8, Item D-2:

Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:

(1) Application of rules determining eligibility for participation or benefits;

(2) Calculation of services and compensation credits for benefits;

(3) Preparation of employee communications material;

(4) Maintenance of participants' service and employment records;

(5) Preparation of reports required by government agencies;

(6) Calculation of benefits;

(7) Orientation of new participants and advising participants of their rights and options under the plan;

(8) Collection of contributions and application of contributions as provided in the plan;

(9) Preparation of reports concerning participants' benefits;

(10) Processing of claims; and

(11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are

fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

However, although such a person may not be a plan fiduciary, he may be subject to the bonding requirements contained in section 412 of the Act if he handles funds or other property of the plan within the meaning of applicable regulations.

The Internal Revenue Service notes that such persons would not be considered plan fiduciaries within the meaning of section 4975(e)(3) of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

Facts [1]

The Sheet Metal Workers' National Pension Fund (hereinafter *Fund*) provides a pension plan summarized in a booklet provided to participants and beneficiaries ("Booklet") (Sweger Aff., ¶ 6, Record 24).[2] The Fund

---

[1] Respondents also incorporate by reference the statement of facts in the decision below. Petitioner's Appendix (hereinafter *Pet. App.*) at 1-13.

[2] The Fund sent Booklets to all Sheet Metal Workers Local Union 18 members in mid-1990, using the International Union's mailing list. Schmidt and his father were Local 18 members. The Fund mailed the Booklets according to its usual and customary method of sending the Booklets by First Class U.S. Mail, with prepaid

is governed by a Board of Trustees (hereinafter *Trustees*) (Sweger Aff., ¶ 4, Record 24). The Fund employs benefit analysts to perform various non-discretionary tasks. The benefit analysts have no fiduciary responsibilities. *Id.*

This case involves eligibility for death benefits under the pension plan. The pension plan, as described in the Booklet, permits a participant to designate a death benefit beneficiary by completing a card, contained in the Booklet, and filing the card with the participant's local union. *Id.* If no beneficiary is so designated, the death benefit is paid to a spouse, if any, or to the participant's children in equal amounts. *Id.* The petitioner, Richard A. Schmidt, concedes that his father, the particpant, did not designate him as the beneficiary pursuant to the Booklet, Section 7.01 (Amended Compl., ¶ 18, Record 13). Nonetheless, Schmidt claims he is entitled to the entire lump-sum benefit, rather than having to split the benefit with his sister as the Fund determined. Schmidt bases his claim on his contention that Eunjae Lee, a benefit analyst, orally misrepresented the beneficiary designation requirement, thereby modifying the written plan.

REASONS FOR DENYING THE WRIT

A. THE SEVENTH AND D.C. CIRCUITS ARE NOT IN CONFLICT BECAUSE THE *SCHMIDT* AND *EDDY* CASES ARE MATERIALLY DIFFERENT IN THEIR FACTS, ISSUES AND HOLDINGS.

Schmidt asserts that the Seventh Circuit's decision below (hereinafter *Schmidt*) conflicts with the District of

---

postage (Bishop Aff., ¶ 5, Record 22; Sweger Aff., ¶ 7, Record 24). Implicit in ERISA's statutory and regulatory disclosure scheme, where a pension fund uses First Class U.S. Mail for summary plan descriptions, it need not establish actual receipt by each claimant. See 29 C.F.R. § 2520.104b-1(b)(1) Disclosure (providing that mailing summary plan descriptions by second or third class mail requires return and forwarding postage, and an address correction request).

Columbia Circuit's decision in *Eddy v. Colonial Life Insurance Company of America,* 919 F.2d 747 (D.C. Cir. 1990). *Schmidt* and *Eddy* do not conflict.

In *Schmidt* the court held that an oral misrepresentation by a non-fiduciary employee of a pension plan does not, without more, constitute a breach of the Trustees' fiduciary duties to the participant; especially where the fiduciaries had, in fact, provided the participant with full and accurate information in the Booklet. In *Eddy,* by contrast, the D.C. Circuit held that the fiduciary had not provided the participant with full and accurate information, and thereby breached its fiduciary duty.

The Seventh Circuit viewed *Schmidt* as a case where "[t]he Trustees provided complete and accurate information in the Plan and Plan Booklet only to have a ministerial employee make a negligent misrepresentation in response to a single question from a single participant." (Pet. App. 10). In determining whether the Trustees had breached their fiduciary duties, the Seventh Circuit considered "[w]hether Lee's misstatement could be said to have breached the duties owed to plan participants by the Trustees themselves, as they were the only ERISA fiduciaries named as defendants in this case." (Pet. App. 9). The Seventh Circuit held "that Lee's misstatement would not in these circumstances support a breach of fiduciary duty claim against the Trustees." (Pet. App. 11).

In *Eddy, supra,* the D.C. Circuit considered the scope of an insurance company's duty to "disclose and inform". *Eddy v. Colonial Life Insurance, supra,* 919 F.2d at 751. The D.C. circuit held that the duty to "inform" requires that a fiduciary not only refrain from misinforming beneficiaries, but refrain from silence:

> Regardless of the precision of his question, once a beneficiary makes known his predicament, the fiduciary "is under a duty to communicate . . . all material

> facts in connection with the transaction which the trustee knows or should know." [citation omitted]

Id. at 751.

In its search for a circuit conflict, Schmidt misreads the *Eddy* decision. Schmidt represents that in *Eddy*, "a non-fiduciary insurance agent, not a fiduciary, failed to covey [sic] complete and correct information to Eddy." (Petition, p. 11). Schmidt's factual assertion that the agent was not a fiduciary contradicts the D.C. Circuit's express finding that "Chubb [the insurance company] concedes that it is a fiduciary within the meaning of sec. 1104 of ERISA, 29 U.S.C. § 1104." *Eddy v. Colonial Life Insurance, supra,* 919 F.2d at 750. Given that the court and the parties deemed that the participant dealt with an insurance company fiduciary, the D.C. Circuit's holding that there is a duty to convey complete and correct material information is explicitly limited to *fiduciaries*:

> We find that the standard of care articulated by the trial court was too narrow and hold that a *fiduciary* in Chubb's position has a duty upon inquiry to convey to a lay beneficiary like Eddy correct and complete material information . . . .

Id. (emphasis added).[3] By contrast, the Fund's benefit analyst is not a fiduciary; therefore, Schmidt was not dealing with a fiduciary when he dealt with the Fund.

---

[3] Schmidt's baseless assertion that the agent in *Eddy* was not a fiduciary may be a misreading of the D.C. circuit's statement that "[o]nce Eddy indicated his predicament to *Chubb representatives*, Chubb bore a fiduciary duty under ERISA to convey to Eddy correct and complete material information as to his status and his coverage options." *Eddy v. Colonial Life Insurance, supra,* 919 F.2d at 752 (emphasis added). The assertion that Chubb's representatives are non-fiduciaries is baseless because the D.C. Circuit does not comprehensively describe Chubb's representatives, but for purposes of its analysis, assumes that the representatives are fiduciaries; the only logical inference from the *Eddy* decision, then, is that Chubb's representatives are fiduciaries

The Seventh and the D.C. Circuits applied the same standard: Whether the fiduciary met its obligation to properly inform the participant. Based on the particular facts of each case, the Seventh Circuit held that the fiduciary satisfied its duty, while the D.C. Circuit held that the fiduciary breached its duty. Specifically, the Seventh Circuit considered whether the Trustees acted prudently in hiring, training, and retaining the benefit analyst. The Seventh Circuit held that the Trustees satisfied their fiduciary duty notwithstanding the benefit analyst's alleged error. Since, the Seventh Circuit's decision is entirely consistent with *Eddy*, Petitioner presents no conflict in the circuits.

B. PETITIONER'S ARGUMENT THAT PLAN FIDUCIARIES ARE BOUND BY A NON-FIDUCIARY EMPLOYEE'S ORAL MISREPRESENTATION IS CONTRARY TO ERISA, AND IF ACCEPTED, WOULD JEOPARDIZE THE SOLVENCY OF PENSION PLANS LIKE THE FUND.

It is important to note what the Petition seeks. The courts below held that the Fund was not estopped from denying the full death benefit. Schmidt does not seek certiorari on his estoppel claim. Rather, Petitioner only raises the Trustees' alleged breach of fiduciary duty as a basis for certiorari. The distinction is critical. This is not now a benefits claim against the Fund to be paid from Fund assets (as would be the case if estoppel were applied). The Fund could not pay for a successful breach of fiduciary duty claim against the Trustees, but instead each Trustee would be liable. 29 U.S.C. § 1106(b)(1). Thus, the Seventh Circuit correctly examined only the Trustee's duties to Petitioner.[4]

Every court of appeals to have considered the issue supports the Seventh Circuit's rejection of Schmidt's breach

---

[4] In *Eddy*, the insurance company was the fiduciary. Thus, the court there examined the insurance company's duties to the participant; and the insurance company was liable for the breach.

of fiduciary duty claim against the Trustees based on an alleged oral misrepresentation by a non-fiduciary such as Lee. In *Pohl v. National Benefit Consultants*, 956 F.2d 126 (7th Cir. 1992), the Seventh Circuit held that claims based on oral modifications are not available because ERISA confines benefits to written plans:

> One of ERISA's purposes is to protect the financial integrity of pension and welfare plans by confining benefits to the terms of the plans as written, thus ruling out oral modifications.

Id., 956 F.2d at 128. The court in *Pohl* also explained that a claim for a non-fiduciary's misrepresentation cannot be revived under another name such as "breach of fiduciary duty" as Schmidt attempts here:

> ERISA makes the existence of discretion a sine qua non of fiduciary duty. 29 U.S.C. § 1002(21)(A) . . .
>
> . . . Hence, the [plaintiffs] have no claim against [the non-fiduciary plan administrator] under the fiduciary provisions of ERISA—or under any other provisions. They have no claim . . .

Id., 956 F.2d at 129.[5]

The Seventh Circuit's holding that trustees do not breach their fiduciary duties by refusing to modify written

---

[5] *Pohl* expresses the rule in all circuits that have spoken to the issue. *See* discussion in *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d 790, 795 n.4 (1st Cir. 1995); *Moore v. Metropolitan Life Insurance Company*, 856 F.2d 488, 492 (2nd Cir. 1998); *White v. Provident Life & Accident Insurance Company*, 114 F.3d 26, 29 (4th Cir. 1997); *Weir v. Federal Asset Disposition Ass'n*, 123 F.3d 281, 289 (5th Cir. 1997); *Sprague v. General Motors Corporation*, Nos. 94-1896/94-1897/94-1898/94-1937, 1998 U.S. App. LEXIS, 84, *37 (6th Cir. 1998); *Librizzi v. Children's Memorial Medical Center*, Case No. 97-1934, 1998 U.S. App. LEXIS 1039, *3 (7th Cir. 1/26/98); *Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849, 856 (7th Cir. 1997); *United Paperworkers v. Jefferson Smurfit*, 961 F.2d 1384, 1386 (8th Cir. 1992); *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1996) (en banc).

plan language based on a non-fiduciary employee's oral misrepresentation is also firmly rooted in ERISA's legislative purpose:

> In the words of the key congressional report, "[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan. HR Rep. No. 93-1280, p. 297 (1974) (emphasis added).

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. ——, 131 L.Ed.2d 94, 103 (1995). Congressional concern underlying ERISA's requirement that participants' rights be governed by written plan documents not only ensures predictability, but protects future benefits:

> . . . [R]etirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements.

Franklin v. QHG of Gadsen, Inc., 127 F.3d 1024, 1029 (11th Cir. 1997) (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986)).[6]

Thus, the Seventh Circuit's decision carries out ERISA's goal of protecting employee benefit plan participants and beneficiaries from uncertainty and radical changes to their future benefits. Moreover, The result Schmidt seeks would essentially make the Trustees the Fund's insurers for non-fiduciary employees' ministerial errors, even where the Trustees prudently performed their duty to select, train and maintain non-fiduciary employees. ERISA's fiduciary rules do not contemplate such a far reaching standard. Indeed, the regulations expressly permit fiduciaries to rely on non-fiduciaries to perform ministerial functions includ-

---

[6] In the case below Petitioner was provided full and accurate information in the plan Booklet. If a non-fiduciary misrepresentation can override the Booklet, then the plan may be subject to claims beyond those contemplated by its terms. This could create funding uncertainties that could threaten plan solvency.

ing the "[p]reparation of employee communications material . . . ," the function wherein Lee allegedly made the misrepresentation. See 29 C.F.R. § 2509.75-8, Item D-2 Q(3), A.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

NAOMI E. SOLDON
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER &
BRUEGGEMAN, S.C.
1555 N. RiverCenter Drive
Suite 202
P.O. Box 12993
Milwaukee, WI 53212
(414) 271-4500
Attorneys for Respondents

March 9, 1998